BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. ESCALON UNIFIED SCHOOL DISTRICT.	OAH Case No. 2014080266

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on August 1, 2014, naming the Escalon Unified School District (Escalon).

Administrative Law Judge Charles Marson heard this matter in Escalon, California, on September 25, 29, and 30, and October 1, 2014.

Eileen Matteucci, Attorney at Law, represented Student. Mother and Father (collectively referred to as Parents) attended the entire hearing. Student did not attend.

Jennifer R. Fain and Jennifer N. Baldassari, Attorneys at Law, represented Escalon. Superintendent Don Costa, and former special education director Lisa Cheney, attended the hearing on behalf of Escalon.

A continuance was granted for the parties to file written closing arguments and the record remained open until October 23, 2014. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES[1]

1. During the 2012-2013 school year, the 2013 extended school year, and the 2013-2014 school year, up to September 27, 2013, did Escalon deny Student a free appropriate public education by:

A. Failing to assess Student to determine his eligibility for special education and related services;

B. Failing to identify him as eligible for special education and related services; and

C. Failing to offer him any special education or related services?

2. Did Escalon, in its September 2013 assessment of Student, deny him a FAPE because the assessment was inappropriately limited in scope?

3. From September 27, 2013, through the 2013-2014 school year and extended school year, did Escalon deny Student a FAPE because it:

A. Failed to offer him a substantively appropriate program of goals, services and placement; and

B. Predetermined its offer of placement in a special day class operated by the San Joaquin County Office of Education (County)?

SUMMARY OF DECISION

This Decision holds that Student did not prove Escalon should have assessed him for special education and given him an individualized education plan in his seventh grade year, the 2012-2013 school year. It finds (a) his misbehaviors were fairly typical of his age group and therefore did not indicate a need for special education, and (b) his attention deficit hyperactivity disorder (ADHD) did not affect his educational performance. However, it also holds that Escalon predetermined Student's placement offer in the County program, and therefore procedurally denied him a FAPE. Because of the latter holding, the Decision does not address the substantive adequacy of Escalon's offer (Issue 3.A.) or of the psychoeducational assessment underlying it (Issue 2)..

[1] Student's issue 3(b) in the Order Following Prehearing Conference has been reworded for clarity and to reflect evidence received at the hearing. (See *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

FACTUAL FINDINGS

Jurisdiction

1. Student is a 14-year-old male who has resided in Escalon at all relevant times. He was found eligible for special education in the category of emotional disturbance on September 27, 2013. Student was diagnosed in fourth grade as having ADHD and bipolar disorder, though the latter diagnosis has since been abandoned. He is a bright, charming, alert young man who succeeds academically and relates readily to others, although his relationships with his peers have been of mixed success throughout his schooling. He is sometimes impulsive, hyperactive, physically aggressive and verbally offensive.

2. Student transferred from the Manteca Unified School District (Manteca) to Escalon in January 2012, the middle of his sixth grade year, when Parents moved to Escalon. He was assigned to Escalon's El Portal Middle School (El Portal). He had been given a 504 plan[2] in Manteca, and Escalon also gave him a 504 plan on his arrival. Student was academically successful in the last half of sixth grade and in seventh grade, receiving A's and B's in all his classes.

3. On September 10, 2013, Student stole another student's cellphone, beginning a series of events (described below) leading to his suspension on September 19, 2013, and to the beginning of expulsion proceedings.

4. On September 27, 2013, Student's IEP team found that his alleged misconduct was a manifestation of his disability, which terminated the expulsion proceedings. It also found he was eligible for special education and related services in the category of emotionally disturbed. Student was offered placement at Lincoln BELIEVE! (Lincoln), a special day class operated by County in North Stockton. Parents declined the offer.

5. Student was then placed on independent study, during which an Escalon teacher began to tutor him at home. In early October 2013, Parents declined the further services of that tutor, and later unilaterally employed a tutor of their choice. Student has not returned to any school since September 27, 2013, as Escalon continues to offer placement at Lincoln and Parents continue to decline it.

[2] A 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

Assessment and Eligibility Before September 27, 2013

6. In elementary school in Manteca, Student was given a 504 plan because of impulsive outbursts, occasional instances of misbehavior, and feelings of worthlessness, depression, grandeur, and guilt. The behavioral events included disruption, stealing, choking another student and drawing images depicting harm to others. These events were never regarded by Manteca as serious enough to warrant suspension.

7. In sixth and seventh grade in Escalon, Student's 504 plans typically provided for preferential seating at the teacher's discretion, reinforcement of appropriate participation, extra time to complete tasks and tests if needed, an extra set of books at home, and a homework assignment notebook. They also provided for cues to stay on task, implementing a classroom behavior management system, ignoring minor inappropriate behaviors, and an "open pass" that allowed him to leave the classroom at times of tension.

8. During sixth and seventh grade at Escalon, Student occasionally misbehaved. In sixth grade, he received a warning for misusing his cellphone, and detention for stealing items from another student's backpack. In seventh grade, he yelled at another student and misused his cellphone three times. Altogether in seventh grade he received four assignments to "Saturday School," a Saturday morning class Escalon uses to punish minor infractions that do not merit suspension.[3]

9. At hearing, these disciplinary incidents were evaluated by Mark Vos, the principal of El Portal.[4] He concluded that the incidents in Student's disciplinary record from sixth and seventh grade were fairly typical of Student's age group, displayed the same kind of impulsivity shown by his peers, were no cause for alarm, and did not indicate a need for assessment for special education.

10. Sandy Pendley, Student's counselor in sixth grade, described him as "pretty good at managing his emotions" at the time.[5] Ruth Gligorea, Student's math teacher in seventh grade, described his behavior as "within norms."[6] She established that Student

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[3] Dr. Elea Berneu, an outside evaluator, later reported that in seventh grade Student got another student wet at a sink and ran around the room, and according to his Life Science teacher "demonstrated disruptive behavior, but was showing improvement." These incidents are not reflected in Student's disciplinary record.

[4] Mr. Vos is in his seventh year as Principal of El Portal.

[5] Ms. Pendley has a multiple subject teaching credential and a master's degree in school counseling, and has been a counselor for Escalon since 2004.

[6] Ms. Gligorea received a teaching credential from the University of the Pacific. She has been a teacher at Escalon since 1988.

occasionally misbehaved in small ways in her class, and that she kept him close to her, but her experience with him was positive and she enjoyed him. He was an active participant, and they got along well. Student's behavior was "nothing atypical," so she never had to refer him for any kind of discipline. He was a "typical boy" and "never a bit disruptive" in her class; "he was a good kid." He did not require any special behavior management system, and his 504 plan was "absolutely" working. She and Student had a prearranged signal by which he could use his open pass, which worked well. She was aware of his diagnoses and had discussed them with Mother, but never saw a need to refer him for assessment for special education.

11. The only evidence suggesting that Student should have been perceived before September 2013 as needing special education (and therefore assessment) was testimony by Dr. Elea Berneu. In November 2013, Parents employed Dr. Berneu, a clinical neuropsychologist, who administered a neuropsychological assessment to Student in November and December 2013.[7] She assessed Student and, in a report dated January 20, 2014, recommended a therapeutic residential program for him because of his emotional disturbance. Her report does not address Student's possible eligibility for special education before her assessment.

12. Dr. Berneu opined at hearing that Student should have been eligible for special education in the category of other health impaired while he was in Escalon between January 2012 and September 2013. She based this conclusion on his diagnosis of ADHD, the existence of his 504 plans, and his lengthy record of minor disciplinary infractions dating back to kindergarten. She did not address whether Student's ADHD resulted in limited strength, vitality or alertness during that period, or whether it adversely affected his educational performance.

13. There was no evidence that Student's ADHD resulted in any limited strength, vitality or alertness between January 2012 and September 2013. To the contrary, the evidence showed that Student was energetic and engaged during that period. Student's records contain several comments praising his academic work habits, which the IEP offers of February 2 and May 23, 2014, characterize as "great." Dr. Berneu found that Student "has grown in the last couple of years when it comes to planning and organizational skills, and his work product and grades have shown that improvement." She also reported that "multiple teachers" told her Student "was an excellent student and a pleasure to have in class."

[7] Dr. Berneu specializes in learning disabilities, ADHD/ADD, cognitive, developmental and psychiatric disorders. She earned her undergraduate degree in psychology at Macquarie University in Australia after attending the University of California at Berkeley, and her Psy.D degree from the California School of Professional Psychology. She has worked at St. Mary's Medical Center, supervised assessments by trainees at the Berkeley Therapy Institute, and since 1999 has done between 30 and 50 evaluations a year.

14. There was no evidence that, between January 2012 and September 2013, Student's ADHD significantly interfered with his education. At Escalon he received A's and B's in all his classes. His overall grade point average in the third trimester of the 6th grade was 3.21; it improved to 3.41 in seventh grade. On his most recent statewide standards test, Student scored "proficient" in English language arts and "advanced" in math. Student has high average intelligence and his academic performance was at or above his cognitive capacity during this period.

The Disciplinary Incidents of September 11-18, 2013

15. Student's misconduct escalated on September 10, 2013, when he stole a cell phone from another student and began making calls on it. A series of student complaints led Assistant Principal Mike Gaston to investigate. Mr. Gaston interviewed witnesses (including Student), decided to recommend that Student be suspended and then expelled, and assembled his recommendations and evidence in a 58-page "Expulsion Packet." In it he charged Student with creating "a hostile educational environment when he gathered students [sic] personal information, contacted them via phone and then compiled a list of names and shared that he would seek revenge over them." The packet contained Mr. Gaston's report and findings, as well as written witness statements from Student, 10 other students whose identities were redacted, and Student's English teacher.

ALLEGATIONS STUDENT ADMITTED

16. Over a period of several days Mr. Gaston interviewed Student repeatedly and required him to write and sign three statements. Mr. Gaston's summary and findings erroneously state that Student admitted all the allegations against him made in the Expulsion Packet. The witness statements in the Expulsion Packet reveal that Student admitted some allegations and denied others. Apparently Mr. Gaston did not discriminate in his summary and findings between actual admissions by Student and claims by other students that he had said something.

17. Student admitted that he stole the phone from Student 1, searched it, sent three texts to Student 1's contacts, and made several calls impersonating someone and "making small talk." He added: "[s]ometimes I would say things like I wish I could get these people back and do . . . [t]his and that, but no physical or verbal threats were made." He admitted he copied several contacts onto his own phone, and that he had previously falsely denied the theft and then pretended to discover and return the phone innocently. But he denied making any threats, and stated he did not understand when one girl accused him of sending her "creepy" messages.

ALLEGATIONS STUDENT DENIED

18. Other students made more serious allegations, which Student consistently denied. Student 2 stated Student had said he knew the phone numbers, addresses and allergies of a group of students, and that he was "going to gain power of the group and use it

against the group." He said he had an "infinity" list, which was a "hit list" that included most of a named group, and had made a logo on his hand, "double infinity," which meant "never stop." Student 2 stated that Student claimed "he was planning to get revenge by breaking up friends, couples, but most of all the group, which scared me [because] he could hurt us." Student was then going "to remove all evidence after his plan 'Double Infinity' was over" by "[b]urning everything and denial."

19. Student 3 charged that Student telephoned her without identifying himself, said "you and your friends ruined my life so now I'm ruining your life" and "watch your back." Student 4 claimed Student 5 said she got "a weird question" on her anonymous ask.fm application;[8] it said "they want to do weird things to [redacted] and they love her . . ." Student 5 then said to Student 4, "I think it's [Student] . . ." Students 7, 8, 9, and 10 repeated various of these charges as rumor or hearsay, attributing them to still other students; one claimed to have heard that "[Student] hacked into the school's computers and has our addresses and is going to get us."

20. The Expulsion Packet also contains a screenshot of an anonymous ask.fm message stating "I'm in the 7th grade and I hate u I always have"; and that someone "is gonna break up with u ... poor duckling idiotic girl."[9] It then states "I no wher u r and I will find u and I will kill u watch Ur back at school today I'm bringing a knife hope u don't get stabed [sic] to death . . ." Although nothing in the packet connects this message to Student, Mr. Gaston's summary and findings appear to charge that Student sent it.

21. Mr. Gaston's summary and findings make the additional allegation that a student showed him a disturbing ask.fm message that "described sexual behaviors and to [sic] fear of being killed at school." This claim is not supported by any witness statement in the Expulsion Packet, but Mr. Gaston established that he did not include everything he was told in the packet. Mr. Gaston reported the more serious claims to the police and unsuccessfully sought help from the wireless carrier for Student 1's phone in tracing the messages.

22. Finally, the Expulsion Packet contains a statement by Rochelle Hesse, Student's English teacher, expressing concern about Student and recounting a recent conversation with him in which he asked her whether she had a quotation she lived by. He stated he had such a quotation: "Before you take revenge, dig two graves."

23. Since Escalon's attempt to expel Student was abandoned after his IEP team determined his conduct was a manifestation of his disability, the disputed allegations in the Expulsion Packet were not subject to any adversary process and their accuracy was never resolved.

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[8] This application allows the posting of personal messages anonymously.

[9] A portion of this message is so blurred that it is incomprehensible except for "stupid bitch," "poor" and "ugly."

Predetermination of Escalon's September 27, 2013, and Subsequent IEP Offers

24. Escalon is a small district with four elementary schools, one middle school (El Portal), and one high school, and the disciplinary incidents of September 2013 created substantial concern in the community. The only way Escalon could place Student in general education in its own system was by returning him to El Portal, which it was unwilling to do because of the disciplinary incidents.

ASSESSMENT BY SCHOOL PSYCHOLOGIST, MS.

25. Because Student had a 504 plan, Escalon knew it would have to determine whether his conduct was a manifestation of his disability. On September 19, 2013, the same day Student was suspended and expulsion proceedings begun, Escalon's school psychologist Kelly Arrighi created an assessment plan, met with Mother, obtained her permission for a psychoeducational assessment of Student, and began to administer tests to him. She wrote a report on September 25 or 26, 2013, concluding that Student's recent conduct was a manifestation of his disability and that he was eligible for special education as emotionally disturbed.

26. Escalon and Parents agreed on September 27, 2013, as the date for an IEP team meeting at which it would be determined 1) whether Student's recent misconduct was a manifestation of his disability,2) whether Student was eligible for special education, and 3) if so, what his IEP should be.

THE COUNTY REFERRAL PACKAGE

27. On September 24, 2013, three days before the IEP team meeting, Escalon began the process of placing Student in a county-run special day class. At the instance of Lisa Cheney, Escalon's Director of Special Education, Ms. Arrighi filled out several County forms in an application packet designed to allow the County to determine whether a particular Student would be appropriately placed in one of the County's special education programs. The completed package was approved by Ms. Cheney. Ms. Arrighi's cover letter opened with these statements:

> *We, as a District, are referring a student by the name of [Student] for county placement* in order to more adequately meet his emotional needs at this time . . . *. . [I]t appears that his needs are more severe and require more than a general education setting can provide at this time.*

(Italics added.) As the italicized passages indicate, the letter shows that, three days before the IEP team meeting, Escalon had already decided that some County-operated placement was appropriate for Student, and had also decided that he could not be placed in any general education setting with any combination of services and supports.

28. The significance of the County Referral Packet was established at hearing by Bruce Kern, Director II of the San Joaquin County Office of Education. The County Referral Packet is the first step in the procedure by which the County authorizes a school district to offer a particular County placement to a student. According to County rules and longstanding practice, a school district may not offer a County placement without first making a presentation to the County's Mental Health Referral Committee and receiving its authorization to make the offer. Normally the procedure is invoked after the student has an IEP.

29. The forms in the County Referral Packet assume that the student has an IEP, and require information about the IEP and statements of some of the views of the Student's IEP team. Rather than inform the County that Student had not yet had an IEP team meeting and did not have an IEP, Ms. Cheney and Ms. Arrighi filled out the County Referral Packet to show that he did. Ms. Arrighi's statement that "We, as a district, are referring . . . Student for county placement" was untrue; the action was not authorized by an IEP team or anyone else except Ms. Cheney. Ms. Cheney signed a statement on the form as follows:

> The team affirms that the current IEP contains complete reason why pre-referral services were considered insufficient by the IEP team or deemed clearly inadequate or inappropriate by the IEP team . . .

This too was false; there was no IEP, and Student's IEP team had not yet met or decided anything.

THE SEPTEMBER 27, 2013, MEETING OF THE MENTAL HEALTH REFERRAL COMMITTEE

30. On the morning of September 27, 2013, Ms. Cheney and Ms. Arrighi traveled to Stockton to meet with the Mental Health Referral Committee, which consists of various County Office of Education and San Joaquin Special Education Local Plan Area representatives including a mental health coordinator, a behaviorist, a school psychologist, a program specialist and a mental health clinician. According to Ms. Cheney, the discussion of Student's placement lasted between 45 minutes and an hour. The group "talked through" but rejected possible placement of Student in general education "back in the District." It discussed possible behavioral goals, Student's need for counseling, the use of social skills groups, and the need for individual therapy. The group discussed possible non-public schools generally, but no specific school was named during the discussion and the consensus was that all were inappropriate for Student. It discussed placement in various County programs – principally Lincoln BELIEVE! and Manteca BELIEVE! – and decided that the latter was inappropriate for Student. The group agreed Lincoln would be an appropriate placement, and Ms. Cheney left the meeting believing she had obtained County authority to offer placement at Lincoln at the IEP meeting that afternoon.

ESCALON'S CONSIDERATION OF OTHER POSSIBLE PLACEMENTS

31. Having ruled out any general education placement for Student on September 24, 2013, Escalon did not consider or investigate any such placement before the September 27, 2013, IEP team meeting. In addition, it was Escalon's policy not to place a special education student in a program operated by another local educational agency when a County placement was available. At the IEP team meeting of May 23, 2014, Parents inquired about the Venture Academy, a general education charter school. According to the meeting notes, written by Escalon staff: "District had not considered [the Venture Academy] due to it being a general education program and due to it being a separate LEA's program."

32. Escalon also did not consider any placement for Student outside of San Joaquin County, in such places as Modesto, Lodi or Elk Grove. It was Escalon's practice not to look for possible placements outside the County if the County had an appropriate placement.[10]

THE SEPTEMBER 27, 2013, IEP TEAM MEETING

33. At the outset of the IEP team meeting, Ms. Arrighi presented her assessment. The team then held a manifestation determination and all agreed Student's conduct was a manifestation of his disability. Finally, the team decided Student was eligible for special education as emotionally disturbed and turned to writing an IEP for him. Escalon offered Student a 30-day diagnostic placement in the County's Lincoln program, starting on October 21, 2013, but Parents did not agree.

34. Escalon did not inform Parents, before or during the September 27, 2013, IEP team meeting about the referral to the County or the meeting of the Mental Health Referral Committee. Escalon did not tell Parents that Mr. Kern, as a knowledgeable County official and member of the Committee, was available by telephone during the meeting to answer Parents' questions. Ms. Cheney may have told Mother, on or about September 20, 2014, that a County placement was one possible option. Ms. Cheney testified that Escalon's reticence was a consequence of a County Policy that districts were not to discuss specific County placements with parents before the County authorized it. But Mr. Kern established that there was no such policy, and there had not been such a policy in his 15 years of County employment. He emphasized that every district was free to discuss the entire continuum of possible placements with Parents, including County programs.

35. The evidence showed that other placements were discussed at the meeting by Escalon team members only in the context of rejecting them and attempting to persuade Parents to accept placement at Lincoln. Mother established, for example, that Parents asked

[10] Distance was apparently not a factor in Escalon's decision not to investigate out-of-county placements. Lincoln, which Escalon offered, is on another district's general education campus in North Stockton. If Student had attended Lincoln, he would have ridden the bus between one and two hours each way every school day.

why a general education placement was not possible, only to have that issue "shot down." She also established that only one possible support in a general education placement – a shadow aide – was discussed, only to be rejected. There was no discussion of a behavior support plan, a behavior intervention plan, applied behavior analysis, the possibility of support from a non-public agency specializing in behavior, or other services and supports in a general education placement.

36. The Escalon members of the September 27, 2013, IEP team discouraged Parents from seeking a placement in any non-public school. According to the IEP meeting notes:

> Mom asked about other programs. Cheney advised looking at some of the other non public schools, but stated that it would be the most restrictive schools possible and are more for students that have more severe disabilities and these programs do not provide much general education curriculum. She stated that it does not seem that it would be the greatest choice because [Student] still needs access to general education curriculum.

37. By the beginning of the IEP team meeting, Parents had not yet been given a copy of the Expulsion Packet. At a meeting several days earlier with Superintendent Don Costa, Parents were given a brief glimpse of the packet and a description of its contents; However, Mr. Costa, following Escalon's expulsion practices, indicated he would not give them a copy until a later stage of the expulsion proceeding. Only on the assistance of Parents' attorney was one provided to them early in the September 27, 2014, IEP team meeting. At that time, Escalon recessed the meeting for 45 minutes to find and copy the Expulsion Packet, allowing the Parents only a brief opportunity to examine it before the meeting resumed. .

38. During the manifestation determination, Parents began to challenge some of the factual assertions in the Expulsion Packet. Ms. Cheney then announced that it was not the role of the IEP team to determine whether the allegations were accurate, and the team would have to assume that they were accurate in order to make the manifestation determination and write an IEP. Ms. Cheney explained at hearing that she imposed this limitation because Mr. Gaston had reasonable suspicion and belief that the events had occurred as he described them, and the IEP team had substantial business before it and did not have time for Parents' "perseverating" over the truth or falsity of the factual allegations. This limitation was imposed not only on the manifestation determination portion of the meeting but also on the later discussion of Student's proposed IEP. Student's proposed present levels of performance, goals and placement were based on the assumption that all the allegations in the Expulsion Packet were true.

THE LATER IEP TEAM MEETINGS

39. Student's IEP team met again on October 16, 2013, and Escalon again offered placement at Lincoln, this time for a 60-day diagnostic placement. Parents again attempted to challenge some of the allegations in the Expulsion Packet, which by then they had studied. Mr. Vos, El Portal's principal, attended the meeting and established that the team's reaction was to say that those issues had already been discussed and the discussion had to move on, and if Father wished to pursue the matter he could meet separately with Mr. Vos. The meeting notes confirm this offer. Parents then abandoned their efforts to challenge the factual assertions in the Expulsion Packet.

40. At the October 16, 2013, IEP team meeting, Student's proposed goals were expanded but were still based on the factual assertions in the Expulsion Packet, which determined the present levels of performance, which in turn affected the goals and the placement in the offered IEP. Once again Parents raised the prospect of placement in general education and once again, according to the meeting notes, the Escalon members of the team rejected the suggestion due to Student's "present levels of emotional need" – as reflected in the Expulsion Packet. No evidence suggested that Escalon had expanded its view of possible placements or investigated any alternatives to Lincoln. Its efforts were directed to persuading Parents to accept the Lincoln placement.

41. Student's IEP team met again on February 4, 2014. Dr. Berneu presented her assessment by telephone and recommended a therapeutic residential placement for Student, but District members of the team opposed this as unnecessary. Parents agreed. Other placement options were discussed but only in the sense that the Escalon members of the team continued to reject them. There was still no indication that Escalon had investigated any alternatives to Lincoln, and its view of alternative placements still excluded possible general educational placements in and out of the County, and non-public schools. Student's goals, still governed by the Expulsion Packet, were rewritten. Once again Escalon team members urged Parents to accept the Lincoln placement.

42. Escalon held a final IEP team meeting on May 23, 2014. Student's goals were slightly modified. With one exception, Escalon's consideration of possible placements did not broaden; Parents had identified several non-public schools that might be considered, and Escalon had sent a representative to accompany Parents on their visits to those schools. Parents were unwilling to place Student in any of them and the Escalon members of the IEP team agreed with that judgment. The allegations in the Expulsion Packet continued to govern Escalon's view of Student's present levels of performance, goals and placement. Escalon once again offered Lincoln, and Parents again declined.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA[11]

1. This due process hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. §§ 1400 et. seq.; 34 C.F.R. §§ 300.1 et seq. (2006);[12] Ed. Code, §§ 56000 et seq.; and Cal. Code. Regs., tit. 5, §§ 3000 et seq.)

2. The main purposes of the IDEA are: 1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment, further education, and independent living, and 2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1)(A), (B); Ed. Code, § 56000, subd. (a).)

3. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39(a)(1); Ed. Code, § 56031, subd. (a).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a); Ed. Code, § 56363, subd. (a).)

Burden of Proof

4. Because Student filed the request for due process hearing, he had the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [163 L.Ed.2d 387].)

Consequences of Procedural Error

5. A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child; or, (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see

[11] Unless otherwise indicated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

[12] All references to the Code of Federal Regulations are to the 2006 version unless otherwise stated.

Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 [*Target Range*].)

Failure to Assess and Find Student Eligible for Special Education Before September 2013

6. Student contends that from his arrival in Escalon in January 2012 until September 27, 2013, Escalon should have: (a) taken his occasional misbehaviors and attention deficit hyperactivity disorder (ADHD) seriously enough to assess him for special education, rather than giving him a 504 plan; (b) decided that he was eligible in the categories of emotional disturbance and other health impaired; and, (c) offered him special education and services. Escalon contends that Student's 504 plans in his seventh grade year were successful in limiting his misbehaviors to those typical of his age group, that his ADHD had no effect on his education, and that Student was academically successful, receiving A's and B's in all his classes. Therefore, Escalon contends, it had no reason either to assess him for special education or determine that he was eligible for it in any category.

OBLIGATION TO SEEK AND SERVE

7. The IDEA and State law impose an affirmative duty on school districts to ensure that all disabled children who are in need of special education and related services are "identified, located, and evaluated." (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300, subd. (a).) Districts are required to establish written policies and procedures for a continuous child-find system. (Ed. Code, § 56301, subd. (d)(1).) A district's duty is not dependent on any request by the parent for special education testing or referral for services; the duty arises with the district's knowledge of facts tending to establish a suspected disability and the need for special education. (34 C.F.R. §§ 300.111(a)(1)(i), (c)(1); Ed. Code, § 56300, subd. (a).) A district must ensure that a child is assessed "in all areas related to" a suspected disability. (Ed. Code, § 56320, subd. (f).)

ELIGIBILITY AS EMOTIONALLY DISTURBED

8. A student is eligible for special education and related services in the category of emotional disturbance when he exhibits one or more of the following characteristics over a long period of time, and to a marked degree, which adversely affect educational performance:

(a) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(c) Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations;

(d) A general pervasive mood of unhappiness or depression; or

(e) A tendency to develop physical symptoms or fears associated with personal or school problems.

(Cal. Code Regs., tit. 5, § 3030, subd. (i).)[13]ELIGIBILITY AS OTHER HEALTH IMPAIRED

9. A student is eligible for special education and related services in the category of other health impaired if he meets the following criteria:

> A pupil has limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, and hematological disorders such as sickle cell anemia and hemophilia which adversely affects a pupil's educational performance.

(Cal.Code Regs., tit. 5, section 3030, subd. (f).) ADHD may be a qualifying health condition for other health impairment, but all the requirements of the definition above still must be met. (Ed. Code, § 56339, subds. (a), (b).)

ANALYSIS

10. Student did not prove that his emotional condition prior to September 2013 was so severe that he required assessment for special education or eligibility as emotionally disturbed. His misbehaviors did not rise to that level of concern. Mr. Vos and Ms. Gligorea were credible witnesses. Mr. Vos displayed both a balanced perspective on juvenile misbehavior and substantial familiarity with student discipline records, including Student's.. Ms. Gligorea has taught for 30 years and has referred "many, many" students for assessment for special education. Their testimony that Student's misbehaviors during this period were minor and typical of his age group was persuasive. His behavior did not give Escalon reason to suspect that he needed special education. Mr. Vos and Ms. Gligorea testified persuasively that they did not.

11. Student does not argue in his closing brief that his sixth and seventh grade misbehaviors were more serious than Mr. Vos and Ms. Gligorea regarded them. Instead, Student attacks the provision in his Escalon 504 plans which required "Ignoring [of] inappropriate behaviors not drastically outside of the classroom limits." Arguing that the provision "could not have had a remedial or therapeutic purpose," Student asserts that this

[13] The definitions of eligibility in the categories of emotionally disturbed and other health impaired are those in effect at the time of the events addressed in this Decision. Those definitions have since been amended. (See Cal.Code Regs., tit. 5, § 3030, subds. (b)(4), (b)(9) [effective July 1, 2014].)

resulted in "a large category of inappropriate behavior [that] would not be documented, tracked, [or] compiled . . ." The 504 plan "was constructed in such a way that it would not trigger staff's notice and referral for assessment until Student did something . . . 'drastically beyond the limits of acceptability . . .'" Student argues that Escalon's failure to provide any behavioral interventions or services[14] and its deliberate overlooking of minor maladaptive behaviors "successfully prevented any effective documentation of Student's behavioral deficits/needs/difficulties from March 2012 until September 2013." This amounts to a concession that the documentation of Student's behavior in those years does not support his argument that he should have been assessed. There was no evidence of the existence of any behaviors that were at once too minor to be documented but at the same time sufficient to trigger a duty to assess. The testimony of Mr. Vos, Ms. Gligorea, Ms. Pendley, and Dr. Berneu's report that Student's teachers said he was a pleasure to have in class, suggested that maladaptive behaviors did not occur to any significant degree.

12. Student also contends that it was because Escalon pursued this strategy of ignoring minor behavior that his conduct eventually escalated in September 2013. However, there was no evidence that this strategy was unwise or lacked a remedial or therapeutic purpose, or any evidence that it led to the events of September 2013. According to Dr. Berneu, the provision had been in Student's 504 plans since the third grade. Student did not ask Dr. Berneu or any other professional to opine on the wisdom, purpose, or effect of the provision.

13. Nor did Student prove that his ADHD required assessment for special education or eligibility as other health impaired. Dr. Berneu's opinion to the contrary was unpersuasive. Her assessment did not address Student's eligibility before January 2014. Even at that time, she wrote, he "could" be eligible in the category of other health impaired, but emotionally disturbed was "more appropriate."

14. Dr. Berneu's impressions of Student were developed when she evaluated him in late 2013 and early 2014, and from subsequent contacts. By that time his emotional condition was considerably worse than it was during the sixth and seventh grades. According to the notes of Student's psychiatrist, Mother stated in May 2013 that Student was doing well in school, but stated during summer 2013 that his emotional condition had worsened, perhaps because he was not taking his medications. Since the disciplinary events of September 2013, Student has been out of school and confined at home without any contact with school peers. There he has brooded on the perceived injustice of his removal from school and, according to Ms. Pendley (who tutored him at home during part of October 2013) has become "obsessed" with righting wrongs and taking revenge. Ms. Pendley told the IEP team on October 16, 2013, that these feelings had become so strong that she was concerned for Parents' safety. By the time of the February 4, 2014, IEP team meeting, Dr. Berneu told the team Student was "withdrawing more," and Parents told the team his behavior at home was worsening.

[14] Student does not explain why the provisions of his 504 plans are not behavioral interventions.

15. Dr. Berneu was conscious of the limitations of the opinion she expressed on Student's pre-September 2013 eligibility. She acknowledged that it was hard for her to know Student's situation during those years or judge it in retrospect because she did not know Student then. She volunteered the statement that she could not write her view on a piece of paper and sign it as her professional opinion. She conceded her view was based to some degree on impressions for which she could not cite or locate documentation.

16. In forming her opinion, Dr. Berneu relied primarily on the behavioral incidents that occurred in Manteca, not Escalon, from first grade through the first half of sixth grade. These incidents were not part of the cumulative records that Manteca sent to Escalon when the family moved. Escalon did not know about them until September 2013, when Mother informed Ms. Arrighi of them, and Student does not argue that Escalon was under any duty to seek them out earlier.

17. None of the behavioral incidents of which Escalon was aware between January 2012 and September 2013 showed any emotional disturbance to a marked degree or a need for special education. There was no evidence that Student's ADHD manifested itself in limited vitality, strength or alertness, or that any such limitation affected Student's academic performance. Student's grades were high and rising and his standardized test scores were high, indicating that he was working at or above his cognitive capacity. Student's argument that grades alone are not determinative of ineligibility (e.g., 34 C.F.R. § 300.111(c)(1)[student may be eligible even though advancing from grade to grade], while accurate, does not account for other factors on the record which support Escalon's position: a) positive teacher reports, b) Student's energy, focus and concentration in class and in academic work, c) his excellent study habits, and, d) the absence of any but minor and typical disciplinary infractions. Further, Dr. Berneu established that Student's ADHD manifested in behavioral outbursts, not academic issues.

18. Student did not bear his burden of proving that, during the period January 2012 to September 27, 2013, Escalon unlawfully failed to assess him for special education, find him eligible, or provide him an adequate IEP.

Limited Scope of Escalon's September 2013 Psychoeducational Assessment

19. Student contends that Ms. Arrighi's assessment of Student was too limited in scope for use in sound placement decisions. It is not necessary to decide this issue. No alleged deficiency in Ms. Arrighi's assessment affected the manifestation determination, which was resolved in Student's favor. Such an alleged deficiency might have misled the IEP team into making inappropriate decisions and IEP offers in the September 27, 2013, and subsequent IEP team meetings, but those decisions and IEP offers are invalidated in this Decision on procedural grounds, so their substantive defects, if any, do not matter to the outcome of this Decision.

Failure to Offer a Substantively Appropriate Program from September 27, 2013, to the End of the 2013-2014 School Year and Extended School Year

20. Student contends that, from September 27, 2013, through the 2013-2014 school year and extended school year, Escalon denied him a FAPE because it failed to offer him a substantively appropriate program of goals, services and placement. It is not necessary to decide this issue because the IEP offers in question are invalidated in this Decision on procedural grounds. (*Anchorage Sch. Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1054-1055; *Amanda J. v. Clark Cnty. Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 895; *Target Range, supra,* 960 F.2d at p. 1485.)

Escalon's Predetermination of the Offer of Placement at Lincoln

21. Student contends that Escalon significantly impeded Parents' right to participate in the IEP decision-making process by predetermining its offer of Lincoln before all four of the relevant IEP team meetings. In other words, Escalon team members arrived at those meetings having already decided to offer Student placement in Lincoln, and unwilling to fairly consider any other possible placements.

PREDETERMINATION AND PARENTAL PARTICIPATORY RIGHTS

22. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

23. "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v.Parma City School Dist.* (2007) 550 U.S. 516, 524 [167 L.Ed.2d 904]. Protection of parental participation is "[a]mong the most important procedural safeguards" in the Act. (*Amanda J. v. Clark County School Dist., supra,* 267 F.3d at p. 882.)

24. A district's IEP team members may consider placement options or have opinions about placement before an IEP team meeting. (*Nack v. Orange City Sch. Dist.* (6th Cir. 2006) 454 F.3d 604, 610-611.) They need not arrive with blank minds, merely open minds. (*Doyle v. Arlington Sch. Bd.*(E.D. Va.1992) 806 F.Supp. 1253, 1262.) But they may not arrive with closed minds. They may not independently develop an IEP without parental input and then present the IEP to the parent for ratification (*Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131; *Target Range, supra,* 960 F.2d at p. 1485.) Predetermination occurs when a school district has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes Unified Sch. Dist. (I)* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345 [nonpub. opn.].) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County Sch. Dist.* (9th Cir. 2008) 552 F.3d

786, 801, fn. 10.) "Participation must be more than mere form; it must be *meaningful*." (*Deal v. Hamilton County Bd. of Educ*. (6th Cir.2004).392 F.3d 840, 858 [(citations omitted; emphasis in original].)

25. Predetermination also occurs when a district makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team. (*R.L. v. Miami-Dade County Sch. Bd.* (11th Cir. 2014) 757 F.3d 1173, 1188 [citation omitted].) This is particularly true when a district decides upon a placement before an IEP is written, because a placement decision must be "based upon a child's IEP." (34 C.F.R. §300.116(b)(2).)

26. To establish predetermination, Parents need not prove that every element of an IEP was decided in advance. Predetermination of all or a significant portion of an IEP is a procedural violation. (*R.L. v. Miami-Dade County Sch. Bd.*, *supra*, 757 F.3d at p. 1188 [predetermination of "material aspects" of IEP denied FAPE]; *Berry v. Las Virgenes Unified Sch. Dist. (II)* (9th Cir. 2010) 370 Fed.Appx. 843 [nonpub. opn.][predetermination to transfer student from private school to district denied FAPE]; *Deal v. Hamilton Cnty. Bd. of Educ*, *supra*, 392 F.3d at p. 857 [predetermination not to offer applied behavioral analysis denied FAPE]; *Spielberg v. Henrico County Public Schools* (4th Cir. 1988) 853 F.2d 256, 258-259 [predetermination to place student in particular school denied FAPE].)

27. Motive and intent are relevant to predetermination. (*H.B. v. Las Virgenes Unified Sch. Dist. (I), supra,* 239 Fed.Appx. at p. 345.) Escalon equated placement in general education with Student's return to El Portal, which it was unwilling to allow. It should be noted that Escalon's motivations for keeping Student out of El Portal were legitimate and strong; school staff believed that Student posed a threat to the safety of other students and they to him. Parents also opposed returning Student to El Portal because of concerns for his safety. However, Escalon did not use the normal legal mechanisms for removing a special education student from a campus because he is a danger to himself or others. (See, e.g., 20 U.S.C. § 1415(k)(3)(B)(ii)(II)(4)[temporary removal by hearing officer]; *Honig v. Doe* (1988) 484 U.S. 305, 327-328 [98 L.Ed.2d 686][temporary removal by district court judge]. It appears that Escalon turned instead to the IEP process to keep Student off the El Portal campus.

28. On September 24, 2013, three days before Student's first IEP team meeting, Ms. Cheney and Ms. Arrighi wrote in the County Referral Packet that Escalon had already decided Student could not be educated in general education under any circumstances and needed a County placement. This constitutes persuasive evidence that they had already made those decisions for Escalon. Those decisions were not "based upon [Student's] IEP." (34 C.F.R. §300.116(b)(2).)

29. At hearing Ms. Cheney and Ms. Arrighi lost substantial credibility when they attempted to minimize the significance of the County Referral Packet. They claimed that when the sent it, they had not yet decided on a County placement for Student. This was literally true in the sense they had not yet decided which County placement Student needed.

They had, however, decided that *some* County placement was required. Ms. Cheney and Ms. Arrighi claimed that the County Referral Packet was just a formality required to make an appointment with the County's Mental Health Referral Committee to determine what options for Student's placement were available. The essence of their testimony was that filling out the Referral Packet was the only way they could even discuss possible placements with the County, and the Packet meant no more than that. This testimony was misleading at best, because the County Referral Packet had greater significance than they admitted.

30. Mr. Kern's description of the purpose of the County Referral Packet was more accurate. In his testimony Mr. Kern was careful and thoughtful; his testimony was consistent with the contents of the packet itself; and cross-examination did not reveal any errors or overstatements in his testimony. As a result, Mr. Kern's testimony is given substantial weight here. He established that submission of the County Referral Packet is the first step in the process by which a district obtains authorization to offer a particular County placement at an IEP team meeting. The next step is an appearance before the Mental Health Referral Committee; then the Committee may authorize a district to offer a particular County placement.

31. Escalon's haste in arranging a County placement suggests it had a purpose beyond determining Student's needs and meeting them. Ms. Arrighi arranged for and began her assessment on September 19, 2013, a Thursday, the same day Student was suspended. The next Tuesday, September 24, 2013, three school days later, she and Ms. Cheney sent in the Referral Packet. Ms. Arrighi had not yet completed her assessment, which would be the only special education assessment Escalon would have for the upcoming IEP team meeting. Ms. Cheney and Ms. Arrighi falsified the County Referral Packet so that it stated that Student had an IEP as the result of an IEP team meeting.

32. Escalon did not inform Parents about the County referral or the meeting of the Mental Health Referral Committee, and did not clearly inform Parents that Mr. Kern was available during the IEP team meeting of September 27, 2013, to discuss County placements. Although Ms. Cheney testified that County policy forbade her from discussing specific county placements without the County's authority, Mr. Kern established that there was no such policy and had not been one for at least 15 years.

33. Escalon made no serious effort to explore non-County placements. Having decided by September 24, 2013, that Student could not be placed in general education, Escalon did not investigate any general education placement. Escalon's policy of not offering placements in programs run by other local educational agencies (such as neighboring school districts) also prevented such an investigation. Escalon also followed its practice of not investigating out-of-County placements when a County placement was available.

34. Ms. Cheney and Ms. Arrighi were the most influential members of the IEP team that was subsequently assembled. Ms. Cheney was in charge, and Ms. Arrighi had done the only assessment. Both had seen the Expulsion Packet. There was no evidence that

the other Escalon members did anything but defer to their judgment. Ms. Cheney and Ms. Arrighi both contended that the entire continuum of possible placements for Student was discussed at the IEP team meeting of September 27, 2013, from general education to the most restrictive non-public school, and that they arrived at the meeting with open minds concerning such possible placements. However, their testimony was not persuasive for the reasons discussed above. The County Referral Packet, among other evidence, shows that by the time of the meeting, both were committed to proposing Lincoln and no other placement. The evidence showed that other placements were discussed by Escalon team members only in the context of rejecting them and attempting to persuade Parents to accept placement at Lincoln. Since Escalon had not considered, and would not propose, any general education placement in another LEA or any placement outside the County, there was no discussion of those options at the meeting. Mother established, for example, that Parents asked why a general education placement was not possible, only to have that issue "shot down." She also established that only one possible support in a general education placement – a shadow aide – was discussed, only to be rejected. There was no discussion of most of the behavioral services and supports that frequently accompany a general education placement of a student with behavioral difficulties. Nor did the District members of the team identify any particular non-public school that Parents might consider; they left it to Parents to identify and evaluate any non-public placement options. The meeting notes do not support the claim that there was an open-minded discussion of general education placements.

35. Predetermination is also evident in Escalon's action in refusing, at the September 27, 2013, IEP team meeting and later, to allow Parents to challenge the factual accuracy of any of the assertions in the Expulsion Packet. District members of the IEP team rejected any general education placement because Student's emotional needs were too great, and that view rested entirely on the allegations of the Expulsion Packet. The present levels of performance set forth in Escalon's proposed IEP were drawn almost entirely from the district's version of the disciplinary incidents. Those present levels determined what the goals would be, and the goals in turn strongly influenced the choice of proposed placement. (See Cal.Code Regs., tit. 5, § 3040, subd. (b)[relationship of present levels of performance, goals and services provided].) For example, one proposed goal required that Student avoid speaking or writing about "grandious [sic] thoughts associated with revenge, threat to harm, and destruction . . ." That assumed the truth of allegations Student denied. The difference between what Student admitted and what he denied had substantial significance for the placement decision. A student who merely steals a cell phone and makes prank calls can likely be placed in general education. A student who uses the stolen phone to make sexually explicit calls to girls and to threaten to stab someone to death may well need a more restrictive environment.

36. The subsequent IEP team meetings on October 16, 2013, and February 4 and May 23, 2014, perpetuated Escalon's predetermination that Lincoln was the appropriate placement for Student. For those meetings Escalon did not investigate or consider alternative placements on its own. The only consideration of other placements was in response to proposals by Dr. Berneu or Parents, and those placements were rejected by Escalon team members. Student's proposed goals evolved but continued to be governed by Escalon's

unchallengeable view of the factual assertions in the Expulsion Packet. For example, on February 4, 2014, Escalon proposed a goal with a baseline stating that emotional regulation and pro-social behavior were "[r]arely observed [in Student] in an educational setting." Ms. Cheney admitted at hearing that this baseline did not accurately describe Student's performance in seventh grade, but was instead based entirely on the disciplinary events of September 2013.

37. In combination, the factors discussed above demonstrated that Escalon predetermined the Lincoln placement. Those factors included Escalon's strong interest in keeping Student off the El Portal campus, its haste in seeking a County placement, the decisions recorded in the County Referral Packet before an IEP team meeting was held, and Escalon's unpersuasive explanation of the purpose of the Packet. They also included its failure to inform Parents of the County process, its unpersuasive explanation of that failure, its failure to investigate other placements, and its restriction on Parent's ability to challenge the factual assumptions underlying the IEP offer. Escalon thereby significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, and thus denied Student a FAPE.

Remedies

38. Parents seek reimbursement for their expenditures for tutoring during the period from September 27, 2013, to the end of the extended school year in 2014, the period in which Student was denied a FAPE. They also seek reimbursement for Dr. Berneu's assessment.

39. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L. Ed. 2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14; 126 L.Ed.2d 284] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress].) Reimbursement may be reduced or denied if the actions of parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).)

40. Student proved that Parents spent $622.50 on the tutoring and behavioral services of Ms. Cohen. Escalon argues that this expenditure was unreasonable, pointing out that it was willing to continue the services of Ms. Pendley or another tutor, and citing decisions holding that it is up to a district to select service providers. However, those decisions address services provided pursuant to IEP's; they do not permit districts to select service providers when Parents are unilaterally obtaining services because a district has denied their child a FAPE. Parents are entitled to select their own private placement as a remedy for denial of a FAPE; the district retains no right of approval and state standards do not apply. (See 34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter, supra*, 510 U.S. at pp. 14-16.) Since services and personnel are parts of placement (see former Cal. Code Regs., tit. 5, § 3042, subd. (a)[now § 3001, subd. (t)), it follows that parents remedying a denial of FAPE may select their own service providers as well. Ms. Cohen's services were successful. Because Mother needed assistance in tutoring Student in some subjects, and Student needed behavioral services, Parents were reasonable in employing Ms. Cohen, and her employment was appropriate. Her rate of $30 an hour was reasonable, as was the number of hours for which Parents retained her services.

41. Student proved that Parents spent $4,800 on Dr. Berneu's assessment. Student does not argue that Parents are entitled to reimbursement for the assessment because of the laws relating to independent educational assessments. Instead, he argues that, since Parents were in charge of his education after September 27, 2013, the assessment was needed to learn whether he was actually emotionally disturbed, to obtain guidance on how best to support him, and to learn what an appropriate educational environment might be for him. The referral questions in Dr. Berneu's assessment report confirm that Parents hired her for those purposes. Employing Dr. Berneu for these purposes was reasonable and appropriate. Dr. Berneu's fee appears reasonable for her assessment, and Escalon does not argue otherwise.

42. Parents do not seek reimbursement for any of the other services they have provided Student. In his complaint, Student requests compensatory education of an unspecified nature, but there was no evidence introduced at hearing about the need for compensatory education. From September 27, 2013, to the end of the 2013-2014 school year, Student received curriculum instruction, some behavioral support, counseling, and psychiatric support, and the record does not show what his further needs for compensatory education might be. For the first time in his closing brief, Student suggests that the ALJ appoint an independent assessor to determine his need for compensatory education. The ALJ declines to do so. Escalon has had no opportunity to take a position on such an appointment. Dr. Berneu provided a recent assessment and testified at length at hearing, but Student did not ask her whether he had additional needs for compensatory education. There is insufficient evidence in the record to support an order for compensatory education beyond the reimbursements ordered here.

ORDER

1. Within 45 days of this Decision, Escalon shall reimburse Parents for their expenditures for tutoring by Ms. Cohen in the amount of $622.50, and for their expenditures for the assessment of Dr. Berneu, in the amount of $4800.

2. Student's other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Escalon prevailed on Issue No. 1, Student prevailed on Issue No. 3(b), and issues Nos. 2 and 3(a) were not decided.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: November 10, 2014

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings